

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 630.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McCLELLAN, WALTER McCLELLAN, AND EDMUND McCLELLAN, PETITIONERS,

vs.

JOHN E. CARLAND, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF SOUTH DAKOTA.

NOTICE OF MOTION.

To the Honorable John E. Carland, United States District Judge for the District of South Dakota:

You will please take notice that on Monday, the 3d day of January, A. D. 1910, at the opening of the court on that day, or as soon thereafter as counsel may be heard, the above-named petitioners will submit a motion (a copy of which is herewith delivered to you) to the Supreme Court of the United States, in its court-room at the Capitol, in the city of Washington, D. C.

GRIGSBY & GRIGSBY,
Attorneys for Petitioners.

MELVIN GRIGSBY,
Of Counsel.

A copy of the foregoing notice, together with a copy of said motion, were this day delivered to me by S. K. Grigsby, Esq., at Sioux Falls, South Dakota.

Dated this 10th day of December, A. D. 1909.

JOHN E. CARLAND, *Judge.*

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McCLELLAN, WALTER McCLELLAN, and EDMUND Mc-
CLELLAN, *Petitioners*,

vs.

JOHN E. CARLAND, *United States District Judge for the
District of South Dakota.*

MOTION TO ADVANCE.

Comes now the above-named petitioners, by Melvin Grigsby, Esq., their counsel, and upon the record and proceedings herein and the following statement of facts and reasons for the application now move this honorable court that the said matter and hearing thereof, upon writ of certiorari issued to the Circuit Court of Appeals of the Eighth Circuit on November 16, 1909, be advanced upon the calendar of the court for argument, submission, and determination.

Statement of Facts.

These petitioners make a part of the statement of facts on which this motion is made, and herewith refer to, the printed transcript of record on file in this matter, and further state as follows:

That on the 8th day of September, 1908, the petitioners, claiming to be heirs-at-law and next of kin of John McClellan, deceased, filed a bill of complaint in the Circuit Court of the United States for the District of South Dakota against one George T. Blackman, as special administrator

of the estate of said deceased, wherein petitioners prayed for a decree in substance adjudging them to be entitled to inherit the said estate; that the fee title of all real estate thereof be decreed to be in them, and that such special administrator account to them for all personal property (Exhibit "A," Transcript of Record, page 4).

That thereafter the said defendant filed his answer to the bill aforesaid, and in effect a general denial thereof (Exhibit "B," Transcript of Record, page 8), to which answer petitioners filed a replication in the usual form (Exhibit "C," Transcript of Record, page 9).

That thereafter, on the 24th day of November, 1908, the State of South Dakota filed a petition in said suit for leave to intervene therein, alleging in said petition in substance that the said deceased had died without heirs-at-law or next of kin and that the said estate had escheated to the State of South Dakota, and that said State of South Dakota was entitled to the possession of the same and of the whole thereof. Upon which petition the said circuit court issued an order directed to the parties to said suit and requiring them to show cause on the 21st day of December, 1908, why leave should not be granted to the said State of South Dakota to intervene as a party thereto (Exhibit "D," Transcript of Record, page 10).

That said order to show cause came on to be heard on said December 21, 1908, and on the 4th day of January, 1909, an order was duly made and entered by the court overruling and denying the said petition of the State of South Dakota for leave to intervene, and further holding and ordering that the further prosecution of the suit brought by these petitioners aforesaid be stayed for a period of ninety (90) days for the purpose of allowing the said State of South Dakota to commence a proper action or proceeding in a proper court to establish its alleged title and interest in and to the said estate, and that in the event that such action be commenced within that time, then that the suit

brought by petitioners be further stayed until the determination of such action brought by the State of South Dakota (Exhibit "E," Transcript of Record, page 11).

That thereafter, on March 11, 1909, the Attorney General of said State of South Dakota and the State's attorney of Minnehaha county, South Dakota, commenced an action in the Circuit Court of the Second Judicial Circuit in and for said county and State, in which action the State of South Dakota is complainant and these petitioners and the said George T. Blackman, as special administrator aforesaid, and other persons are defendants, which action is now pending in said court, and in the complaint in said action said State of South Dakota alleges among other things that said deceased died without issue and without heirs-at-law or next of kin, and that the said estate at his death devolved and escheated to the State of South Dakota, and that by reason thereof the said State of South Dakota has a right by law to said estate and the whole thereof, and said complainant prays for judgment that the title and ownership of all the property belonging to the said estate be determined and quieted in said State of South Dakota against these petitioners and the other defendants, and that it be let into possession of said estate, and that the said special administrator be ordered and directed to pay over and deliver to the officers of the said State of South Dakota, for its benefit, all personal property belonging to the said estate, and for other and further relief accordingly.

That thereafter, upon the affidavit of the State's attorney of said Minnehaha county stating that said action had been commenced in the Circuit Court of the Second Judicial Circuit aforesaid, the said Circuit Court of the United States on the 18th day of March, 1909, made and entered a further order in the suit brought by these petitioners against said special administrator, as aforesaid, staying all proceedings therein until the final determination of that certain action brought and pending in the State court aforesaid by the

State of South Dakota (Exhibit "F," Transcript of Record, page 12).

That thereafter on the 29th day of March, 1909, these petitioners applied to said Circuit Court of the United States for an order directed to said State of South Dakota and said Attorney General and State's Attorney thereof requiring them to show cause why the orders of said Circuit Court of the United States dated, respectively, January 4th and March 18th, 1909, aforesaid, should not be vacated and set aside and why the suit of these petitioners in said United States Circuit Court should not proceed to a speedy hearing and determination, which order to show cause was granted by said United States Circuit Court and made returnable on the 12th day of April, 1909 (Exhibit "G," Transcript of Record, page 13).

That on said 12th day of April, 1909, said order to show cause came on to be heard before said United States Circuit Court and was by said court in all things overruled and denied (Exhibit "H," Transcript of Record, page 14).

That thereafter and on April 22, 1909, these petitioners made application to the United States Circuit Court of Appeals for the Eighth Circuit for a writ of mandamus directing the Circuit Court of the United States for the Southern Division of the District of South Dakota to vacate and set aside the aforesaid order staying proceedings and to try and determine the suit of these petitioners in the usual course of procedure, which petition for a writ of mandamus was overruled and denied by said Circuit Court of Appeals on said day (Transcript of Record, page 15).

That thereafter on November 16, 1909, the Supreme Court of the United States issued its writ of certiorari herein commanding said Circuit Court of Appeals to certify without delay the record and proceedings in said cause so that the said Supreme Court might review the orders aforesaid and act accordingly.

These petitioners further state that they have appeared

in said Circuit Court of the Second Judicial Circuit in and for the county of Minnehaha and State of South Dakota, in the said action of escheat brought by the said State of South Dakota against petitioners, and others, as defendants, and said action not being removable to the courts of the United States under existing laws, by reason of the State of South Dakota being complainant therein, these petitioners have made and filed their answers to the complaint of said State of South Dakota and in said answers have denied that said estate has escheated and have further in said answers set out as a defense to said complaint substantially the same facts as set out by them in their suit brought in said Circuit Court of the United States against the said special administrator of said estate. That a plea of abatement to the said complaint of the State of South Dakota, based on the pendency of such suit brought in said Circuit Court of the United States, was not available to these petitioners by reason of the aforesaid restraining orders of said Circuit Court of the United States. That said action brought by the State of South Dakota in the State court aforesaid is now at issue and is upon the November, 1909, calendar of the said State court for trial and that the Attorney General of said State and the State's attorney of said county are insisting before said court that the same be speedily tried and determined and that although these petitioners have moved said court for a continuance thereof that such motion has not yet been ruled upon by said court and if overruled and denied these petitioners will be compelled to go to trial in said action when the same is reached in the ordinary course of the business of said court, unless a restraining order should be granted by this court or some member thereof.

From the foregoing statement of facts these petitioners affirm and allege that there are manifest reasons why the hearing upon said writ of certiorari should be advanced upon the calendar of this court, as follows:

Reasons for the Application.

That unless a hearing is speedily had upon said writ of certiorari these petitioners may during the pendency thereof be forced to a trial of the said action brought by the State of South Dakota and now pending in the Circuit Court of the Second Judicial Circuit in and for the county of Minnehaha, within said State, in which case the decision of this court upon said writ of certiorari, even if the same were favorable to the petitioners, would be fruitless and afford petitioners no relief for the reason that they would in the meantime have been deprived of their lawful right and privilege, as citizens of various States of the United States, of having their said suit, previously commenced and previously at issue in the United States Circuit Court aforesaid, speedily tried and determined.

Dated at Sioux Falls, S. D., this 10th day of December, A. D. 1909.

JOHN C. McCLELLAN,

JAMES S. McCLELLAN,

WILLIAM S. McCLELLAN,

WALTER McCLELLAN,

EDMUND McCLELLAN,

Petitioners,

By GRIGSBY & GRIGSBY,

Attorneys.

MELVIN GRIGSBY,

Of Counsel.

[Endorsed:] Supreme Court of the United States. October term, A. D. 1909. No. 630. 21,856. John C. McClellan *et al.*, petitioners, *vs.* John E. Carland, United States District Judge, District of South Dakota. Motion to advance cause on calendar. Grigsby & Grigsby, Attorneys. Melvin Grigsby, of Counsel.

[Endorsed:] File No. 21,856. Supreme Court U. S. October term, 1909. Term No. 630. John C. McClellan *et al.*, petitioners, *vs.* John E. Carland, U. S. District Judge, etc. Motion to advance, notice and proof of service. Filed December 13, 1909.